Supreme Court of the United States

OCTOBER TERM, 1902.

No. 149.

JOHN D. HOOKER AND A. E POMEROY, PLAINTIFFS IN ERROR,

vs.

CITY OF LOS ANGELES, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

REPLY BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

I.

ON THE JURISDICTION OF THE COURT.

The case of the Crystal Springs Land and Water Company *vs.* The City of Los Angeles (177 U. S., 169; 44 L., 720), so much relied upon by the defendant in error, is not an authority against us at all. That suit was brought in the United

States circuit court originally, and in its progress through that court and in this court four different questions were presented:

1. The complainant did set forth the Mexican grants and their confirmation and invoked the protection of the treaty.

2. It also alleged the issuance of the United States patent and claimed a right under it, and upon this ground contended that the court had jurisdiction.

3. The complainant also set forth certain statutes of the State of California, being the very same statutes which were introduced in this case, or rather such of them as purported to grant rights to the City of Los Angeles in the property of other persons.

The complainant also alleged that the city claimed under those statutes, and that the statutes themselves were in violation of the fourteenth amendment to the Constitution of the United States.

A demurrer was interposed to this bill, and it was overruled, but in overruling it Judge Wellborn was of the opinion that the only ground of jurisdiction was found in the allegations of the bill with respect to the statutes.

The defendant then answered, and in the answer made what it claimed to be a disclaimer of any right, title, or interest under these acts of the legislature of the State of California; and thereupon moved the court to dismiss the bill, claiming that by this disclaimer they had removed the only ground of jurisdiction.

4. The fourth question that was raised in that case was as to the sufficiency of the plea of the disclaimer, the plaintiff

contending that the so-called disclaimer was no disclaimer at all. Judge Wellborn was of the opinion that the disclaimer was good, and then, upon the authority of Robinson *vs.* Anderson, dismissed the bill, and the complainant appealed to this court. The judgment was here affirmed, but no opinion was filed by this court. It was affirmed, however, upon the authority of certain cases cited by the court.

We, of course, know nothing of the ground of the decision except as we read it in the cases referred to; but an examination of those cases seems to make perfectly plain the grounds upon which the judgment was affirmed.

Without taking them up in the order in which they are cited, we shall now endeavor to show, by referring to those cases, precisely what was decided.

Robinson *vs.* Anderson (121 U. S., 522) was cited. But that case decided nothing except that when the answer of the defendants in that cause came in, whereby they disclaimed any adverse rights against the plaintiff, but for the most part alleged that they were claiming under the plaintiff, then the only ground of jurisdiction in the court was removed. From this it undoubtedly follows that the court approved of the decision of Judge Wellborn, that the disclaimer in this case was sufficient to remove all claim of jurisdiction under the allegations in regard to the statutes.

Another case cited by the court was Phillips *vs.* The Mound City Land and Water Association (124 U. S., 605); that suit was brought in the State court for a partition of certain property. One of the defenses of Phillips was that it had already been partitioned under the Mexican regime, that the allotments had been made to the several parties,

and that they were the owners of these separate tracts in severalty. The State court decided that question against this contention, and held that there had been no partition. A writ of error was sued out and the case was brought here. But now it was decided here that that question was not a Federal question at all. In that case the treaty was invoked; but the answer made to it was that the treaty did not create any rights, nor did it attempt to define them; it only provided that where the right existed it should be protected. The point in that decision was the same that had been ruled before and has been followed since—that, in order to bring a cause within the jurisdiction of a Federal court under the treaty clause, the right claimed must be in some way dependent upon the interpretation of the treaty itself. In the Phillips case no provision of treaty could have had the slightest bearing upon the question of the existence of the right, nor its extent.

That point being ruled was a complete answer to the jurisdiction in the case of the Crystal Springs Land and Water Company *vs.* The City of Los Angeles, so far as it was founded upon the claim made under the treaty. We take it, therefore, that the decision was that the Federal court had no jurisdiction under the treaty clause, because the right claimed did not in any way depend upon the interpretation of the treaty, but, like the Phillips case, the treaty simply said that if we had a right it should be protected. Whether the plaintiff did or did not have such right was determinable by any court of competent jurisdiction.

The only remaining question left was the claim made under the patent issued by the United States Government.

But reference to the other authorities cited leaves no doubt of the exact ground upon which the decision was given upon that point, viz., that ever since the act of 1887, as explained by the act of 1888, in order to give a Federal court jurisdiction originally upon the ground that a Federal question is involved, that Federal question must appear from the plaintiff's *statement of his own claim*. A misunderstanding of the meaning of that rule was the cause of the mistake on the part of complainant in that suit.

The writer of this brief was the attorney for the Crystal Springs Land and Water Co. in that case, and had confounded the statement of his own claim with the statement of his cause of action. But it is now obvious from the cases there cited that that was giving to this phrase a much broader signification than the court had attached to it in the statement of the rule, and that it meant only what was there stated—that it was the statement of the right claimed by him, and not the claims of his adversary, which must develop of itself the Federal question. This was the answer to the claim on the part of the plaintiff of Federal jurisdiction in that case.

So long as the plaintiff confined his pleading to a statement of his own right or claim, no Federal question was involved. In order to constitute a Federal question it was necessary to set forth the claims of its adversary. But this court has decided repeatedly, and the rule is now settled, that if the jurisdiction does not appear upon the statement of his own claim, the plaintiff cannot make it out by anticipating the defenses of the defendant, or setting forth what the defendant claims.

But that this is no answer to the claim of jurisdiction in

this court upon a writ of error to the supreme court of the State is not more distinctly shown anywhere than in the very cases upon which the decision of the Crystal Springs Land and Water Co.'s case was founded.

Thus, in New Orleans *vs.* Benjamin (153 U. S., 411–424) the court, among other things, said:

> "In this class of cases it is necessary to the exercise of the original jurisdiction of the circuit court that the cause of action should depend upon the construction and application of the constitution, and it is readily seen that cases in that predicament must be rare."

The court further said that whether the obligation of a contract is impaired or not is ordinarily a question for the State court in the first instance, the presumption being in all cases that they will do what the constitution and laws require of them, and if they do not do so, then their action may be corrected by a writ of error.

We do not deny that if the facts alleged in the answer in this case had been stated in a bill filed in the Federal court originally, the case would not have been within the jurisdiction, and it would have fallen directly within the principles decided in the Crystal Springs Land and Water Company case. But it is not such a bill, but an answer in which we have specially set up and claimed a right under the United States, and that right has been denied by the State court. This is all that the statute requires to subject that judgment to review by this court upon a writ of error.

It is submitted that the Crystal Springs Land and Water Co. case, when there is read into it the principles which have been decided by the cases upon which it is grounded, not

only does not decide against the claim of jurisdiction here, but in favor of it. The point there decided was that no Federal question was raised by the mere statement of the plaintiff's own claim, and the jurisdiction could not be made out by the statement of the defendant's claim. But here the right claimed under the United States patent has been set up in the State court and denied by that tribunal.

II..

Upon the other Federal question claimed to be involved, and as to whether that claim is sufficiently made, we invite the court's attention to the cases we have cited in the opening brief, especially the case of Kaukauna Water Power Co. *vs.* Green Bay and Mississippi Canal Co. (142 U. S., 254; 35 L. E. D. 1004–1009) and the quotation made from that case on page 77 of the brief. What was said of that case there is equally true of the present. Notwithstanding the inhibition of the Constitution, so far as the procedure in this case was concerned, was not put in issue by the pleadings nor directly passed upon in the opinion of the court, it is evident that the court could not have reached a conclusion adverse to the defendants in this suit without holding that no portion of the property was taken without any compensation therefor, which is equivalent to saying that it had not been deprived of its property without due process of law.

That this is not specially set up is admitted. That we did not specially claim that the provisions of the Code of Civil Procedure of the State of California was in violation of the Constitution of the United States is true. Indeed, the entire discussion of this question by the honorable chief

justice of the supreme court of the State of California will distinctly present exactly what we were contending for there, which was not that the statute was unconstitutional, but that the statute was no authority for such a procedure. It is not until the construction comes that it does appear that the statute was unconstitutional, and it is not pretended in the opinion of the chief justice, nor any of his associates, that any such case had ever occurred before in the history of the State of California and been upheld, nor was it claimed that there was any such case anywhere.

It was admitted by the chief justice that section 1246 of the Code of Civil Procedure of California, which was relied upon by the defendant in error in this particular, did not give it; that that section was providing for the hearing of conflicting claims between the defendants. But in such a case the jury determines the compensation to be paid for the whole, and the plaintiff in the condemnation suit pays it. The controversy between the defendants is as to their respective interests in the fund, with which the plaintiff has no concern whatever (*vide* the opinion, Tr., top pp. 692, 693).

Again, in the opinion of the chief justice, he says:

> "If the views above expressed are in themselves reasonable, and if they embody a proper construction of the statute, they ought to prevail, even if opposed to previous decisions of this court; for no vested right can be violated or impaired by freeing a statutory remedy from inconvenient and burdensome restrictions imposed by a mistaken construction of the law."

He then turns to the cases cited in opposition to this doctrine, and reaches the conclusion that they are not incon-

sistent with the views he had expressed (Tr., 694–696), and says, finally :

"We cannot, in the time at our disposal, undertake to review the numerous citations from the text-writers and the decisions of other courts to which we have been referred by counsel. They undoubtedly contain expressions which in some instances are in conflict with the views above expressed, but we find nothing fairly and fully decided which cannot be reconciled with the conclusion we have reached, that the superior court did not err in overruling the motions to stay the proceedings and strike out" (Tr., 696).

But we say again that, while the cases upon which we relied are thus disposed of, no case is cited in support of the views here expressed; and we repeat that it was the judgment of the court by which the property of these plaintiffs in error was taken, and taken without just compensation, and, as to the more valuable portion by far, without any compensation; and that it is wholly immaterial whether this is done by the court under the alleged sanction of acts of the legislature, or by the mere exercise of a claimed judicial power; for by whatever agencies the citizen is deprived of his property without due process of law, the act is in violation of the fourteenth amendment to the Constitution of the United States, and it is not necessary that the provisions of the constitution should be specially set up or invoked.

Counsel say that we did not make the claim even in the petition for rehearing; to which we answer that that would have accomplished nothing. If the question did not sufficiently appear before, it could not be made to appear by the petition for rehearing.

III.

On the oral argument it was claimed that the exceptions taken to some portions of the instructions to the jury were insufficient to raise the questions we have discussed.

To all such objections it is submitted that the opinions filed in this cause in the supreme court of California are a complete answer.

Counsel read from the opinion of the Chief Justice as far as it suited their occasion, but paused at the very point where the court held that the question was raised sufficiently to be considered and passed upon by that court.

We had contended in the supreme court of California that the statute which made the market value at the time of the issuance of the summons the measure of compensation, if it did so, was unconstitutional; and the chief justice said that—

> "The hardships of this rule, when applied to a case in which so long a time elapses between the issuance of the summons and the trial of the cause, as happened in this instance, are strongly stated by counsel, and their argument against the constitutionality of this feature of the statute would not be undeserving of consideration if they were in a position to urge it. But the fact is this portion of the charge was given in form and in substance as they requested it in the instructions proposed by themselves, and they cannot, therefore, claim that the court erred in allowing it" (Tr., 718, 719).

But now the court will observe that what the Chief Justice is there speaking of was the argument we were making against the constitutionality of the statute in this particular; and it is unnecessary to waste time in considering whether the answer made was justified by the record. The truth is

that the court had ruled against us twenty-five times over upon the question of whether the date of the summons could be made the time for measuring the value, and our instructions were endeavoring simply to obtain what we conceived to be the proper instruction on the lines upon which we knew the court would instruct the jury.

It will be noticed, too, that in the instructions asked by the defendants in the court below there was not in any of them any reference to the market value at the date of the issuance of the summons. What we were insisting upon was that the statute meant what it said, actual value, and nothing else.

However, passing that, Mr. Chief Justice Beatty reconciled these instructions which the court had actually given in the manner in which we have before pointed out, and said:

"If, then, these instructions lay down a correct rule for ascertaining actual value, the charge as a whole is not erroneous. In most respects the charge is sustained by previous decisions of this court (San Diego *vs.* Neale, 78 Cal., 63; Spring V. W. W. *vs.* Drinkhouse, 92 Cal., 523). But there is one objection strongly urged in this case which was not involved and could not have been considered in any case formerly decided here.

"In several of these instructions the jury are told in effect that in estimating the value of these lands they must not take into consideration any fact discovered since the summons was issued. In other words, to use the illustration put by appellants, if a gold mine worth millions of dollars had been discovered in this land the day after the issuance of summons, the city could take the land by paying its value for agricultural purposes.

"This conclusion, it is true, follows logically from the proposition that market value at the date of the summons is to control, and *that is the idea upon which the instructions are based.* But I think this a mistaken idea. The thing to be ascertained is not market value, but actual value (C. C.

P., sec. 1249), and the only reason why market value is taken as the criterion of compensation in ordinary cases is because it is in such cases the true measure of actual value—the only practical test. But in a case where discoveries made after the issuance of summons demonstrate that the actual intrinsic value of the land at that date was greater than its market value—in other words, when it appears that market value is no criterion of actual value—those discoveries should be taken into consideration. As such discoveries were claimed in this case, I think the court erred in giving and refusing the instructions referred to" (Tr., 719).

Now, as has been stated many different times in the course of the oral argument, while in the opinion delivered by Mr. Justice Temple, though he dissents from some of the conclusions of the chief justice (this being one of them), there is no difference between them in regard to the state of the record nor the facts in the case. The question was raised in the supreme court sufficiently for their consideration; they did consider it, and the chief justice was of the opinion that the court below erred; but the majority of the court held the contrary.

We wish to note another thing, in passing, though not very pertinent to the present question: That, while many of these instructions, in describing the conditions upon which the verdict of the jury was to depend, refer to streams which flow along in a natural channel, at some places flowing on the surface, and at some places sinking in porous material which has been deposited in the channel, and thence passing down and along underground, and rising again to the surface, and say that such streams continue to be water-courses in the places where they sink and pass along underneath the surface, the same as when running on the surface, though doubtless having some authority for their support,

nevertheless, so far as this case is concerned, they were dealing with a purely abstract condition. For an illustration of all such instructions, see instruction 21 (Tr., 650). The honorable chief justice, in stating the case, states precisely what appeared in the evidence upon that subject; and, without quoting extensively from that opinion, we call attention to this passage:

"It appears also, as stated above, that the Los Angeles river first appears as a surface stream a few miles west of the tract condemned, and gradually increases in volume as it flows to the east. The fact of this gradual increase in the surface flow of the river, taken in connection with the other facts above detailed, would seem to warrant the inference that the waters of the San Fernando valley in seeking an outlet to the ocean flow under the surface as far as they can find room to pass through the boulders, sand, and gravel which fill the space between the hills on either side, and gradually rise above the surface as the valley narrows, and leaves less and less room for passage underneath" (Tr., 698, 699).

This is exactly what appears in the record of this case. From the time the Los Angeles river appears on the surface until it reaches the sand beds in the city of Los Angeles it never disappears, but increases constantly and gradually; and when it has reached the western boundary of the tract sought to be condemned by the city it has, as before stated, attained a volume of about twelve hundred inches, and goes on increasing until it leaves the tract condemned with about twice that amount.

IV.

UPON THE QUESTION OF THE CHARACTER OF THESE SUBTERRANEAN WATERS.

We are not here going to enter upon the discussion of this question at length, but, in view of the remarks of counsel at the oral argument, we wish to present the thought in our minds, the expression of which is repelled in the opinion of the honorable chief justice. In speaking of what the counsel for the plaintiffs in error were contending in the supreme court of California, and of our criticisms upon certain instructions (13–18), the court, speaking by the chief justice, said that we contended:

> "That in this sense" (that is, in the sense of these instructions) "the whole San Fernando valley is a subterranean stream, and the jury might as well have been instructed in terms to find that there was in this land no percolating water, the property of the defendants. We do not think the instructions referred to, taken by themselves, necessarily bear this construction, and certainly, when considered in connection with those numbered 19 and 20, and others, it clearly appears that the court was not giving, or intending to give, a definition which would make the whole San Fernando basin a subterranean stream" (Tr., 710).

But it is submitted that when it is attempted to make a distinction or to put one's finger on the point where the character of percolating water ceased and that of a subterranean stream began, it will appear that no line of demarkation can be drawn. Prior to the appearance of any surface stream at all were not the waters percolating waters? To say no is to admit that we were correct in saying that under these instructions the whole San Fernando basin was an

underground watercourse, but if it be admitted that they were percolating up to that point did they cease to become so when a surface stream appeared perhaps as much as a foot or two in width and flowing but a few inches of water?

Whoever considers the topography of the country and the mountain ranges by which the water was hemmed in will see that after the water did appear it was just as true, that there was a stream of water flowing on the surface, and that subterranean waters were moving *in the same general direction*, in contact, in a course or general direction which was known, moving at a lesser velocity and through a wider space. This is made the description of an underground watercourse, both in the instructions and in the opinion of the supreme court.

We submit that the only possible difference that can be named, from the time that the Los Angeles river made its first appearance, at the place of that appearance, and any other place, or time, in this entire valley, is this: that where the waters first appeared this plain was very much wider, probably ten or twelve miles in width; but the mountains were there, and formed the banks as before, and circumscribed the movements of the water and compelled its direction, just the same as when it became narrow. Now, if because of the ten or twelve miles in width there is a difference, to what extent must contraction in this space go, before the percolation ceases to be percolation and becomes an underground watercourse? Keep always in mind the fact that these waters, which are moving underneath the surface in the tract condemned, have never made their appearance on the surface anywhere. They have been moving in the same general direction with the surface flow from the

time there was a surface flow, at a lesser velocity, and through a wider space, and that space has contracted until now, when we have arrived at the land in controversy, it is two and a half to three miles, instead of ten or twelve. Furthermore, they are always in contact and the underground waters are supporting the surface flow from the time it first started in the same manner and same sense that they ever are.

We submit that no other difference or distinction can be found in this record anywhere, and that unless the contraction of the space changed the character of the flow, it remained in these lands precisely what it was when it started.

V.

The supreme court of California have not determined the paramount rights of the city of Los Angeles, to the extent claimed in this case, by any of its previous decisions.

In Los Angeles *vs.* Baldwin (53 Cal., 469) it was directly decided that the city was not the owner of the corpus of the water; and, furthermore, the rights which Baldwin claimed in the waters of the river were sustained in that case, and those rights are the same which the city subsequently purchased from the successor of Baldwin in the Los Feliz rancho, which transactions appear in this record and have already been pointed out.

In Feliz *vs.* Los Angeles (58 Cal., 73) the court below had found the facts against the plaintiff and had given judgment in her favor. An appeal was taken from the judgment on the judgment-roll, and the judgment reversed. The report of the case shows that the decision passed upon the findings

of fact made by the court, and among those findings was that the city had always had control of the water until within the last two or three years, when its right was disputed (*id.*, p. 76), and that the uses of the water by the plaintiff were originally by permission and consent of the municipal authority of the pueblo, and have ever since been with such permission and consent, and not adversely nor claimed as of right until within the last three years (58 Cal., 77, finding 6). As the very right which the plaintiff was claiming was by adverse user for more than the statutory period, that finding of course ended their right. But the supreme court, in giving the decision, said:

> "We do not intend to be understood as holding, nor do we hold, that the city has the right at any time to dispose of the water for use upon lands situated without its limits to the injury of the plaintiffs or other owners of land bordering on the river. On the contrary, we are of opinion that the city has not that right."

They did say that, to the extent of the needs of the inhabitants of the city, it had the paramount right to use the waters of the river. But it will be noted that the very need of water in the city at that time, as claimed and as found by the court, was the need for irrigation.

In Lux *vs.* Haggin (69 Cal., 215), Mr. Justice McKinstry delivering the opinion, the court did not hold that the pueblos had any such paramount right as is claimed in the present case. On the contrary, Mr. Justice McKinstry was of opinion that, by the laws of Mexico, the running waters of California were not so dedicated to the common use of the inhabitants that they could not be deprived of them (69 Cal., 313, *et seq.*); that the title to the water remained in the

Government, the use being for the inhabitants, and that was not a vested right of which they could not be deprived (*ib.*); that the pueblos had a species of property in the flowing waters within the limits, or a certain right or title in their use, in trust, to be distributed to the common use and to the lands originally set apart to settlers or subsequently granted by the municipal authorities. But it is to be noted that the title in the waters or their use was subject to the public trust of continuous distribution for use in just proportions; that each pueblo was a quasi-public corporation, and, by Mexican law, treated as an entity or person having such a right, and by reason of its title to four leagues of land to the use of the waters of the river on which it was situated, while, as a political body, it was vested with the power to provide for the distribution of the waters (69 Cal., 328–330).

And further said:

"And, *semble*, that the pueblos had a preference or prior right to consume the waters even as against an upper riparian proprietor. The common use here spoken of is the use for the benefit of the community or inhabitants of the pueblo, whose interests as a whole were to be considered in the distribution of the waters by the officers of the pueblo (Plan of Pictic, sec. 20). It is not necessary here to decide that the pueblos had the preference above suggested" (*ib.*, 331).

This 20th section of Plan of Pictic is set forth (*ib.*, 327, 328). That section not only does not even suggest any paramount or prior right, but it deals with nothing whatever except waters for irrigation, and Mr. Justice McKinstry in that case expressly refrains from deciding that any such priority did exist.

In Vernon Irrigation Co. *vs.* City of Los Angeles is to be

found the first full discussion of this subject. The opinion was written by Mr. Justice Temple, who at that time was one of the commissioners of the supreme court, and his opinion was adopted by the supreme court (106 Cal., 239), and in the course of the opinion he quotes from the case of Lux *vs.* Haggin the passage above cited (106 Cal., 248, 249). Then he says:

"This, however, I think finds support in the history of the pueblo of Los Angeles" (*ib.*, 249).

And, after referring to a few facts of that history, adds:

"When we remember that these pioneers were really farmers or stock-raisers, and that irrigation was a necessity, this order with the instructions is very significant."

In this case it was also held that the city had no power to sell the water to persons outside the city. The question was not raised as to what powers it had to distribute the water to those sections within the charter limits of the city that were not within the patent limits. But now, when it is conceded, as it has been twice decided, that the city could not sell the water outside of the city, to the detriment of the riparian owners, is not that an acknowledgment that a riparian owner does have some rights in the water? If such owners have such rights they are vested rights, and how can they be divested by a mere act incorporating them within the charter limits of the city? Or, what comes to the same thing, how can they be supplanted by a paramount right in the city? In this very case of the Vernon Irrigation Co. it was said:

"It will hardly be claimed that the legislature could grant to the city the water of the river so as to deprive riparian owners of it" (106 Cal., 253).

The statutes here referred to were the same that were introduced in evidence in this case, and we refer to this here as a still further acknowledgment of the fact that riparian owners were not without some rights.

The next case in order of time is The City of Los Angeles *vs.* The Los Angeles City Water Company (124 Cal., 368). In that case the court said:

"The court below, when appointing a receiver to collect the water rates, and enjoining the water company from collecting such rates, seems to have laid stress upon the consideration that the city was the owner of the water in the Los Angeles river, which is used through the water works of the water company. It seems to have been determined, however, that the city has only the right to use such an amount of water of the river as is necessary to supply the wants of its citizens and of the municipality; it has not the right of a riparian owner to have the water of the stream, flow as it is accustomed to flow, without any regard to its use. It is entitled to the use of the water only when it is in a position to use it, and could not recover damages for its diversion except when it was in a position to use it; and it is apparent that it is not in such a position, for it is not in possession of any system of water works through which such use could be exercised" (124 Cal., 393).

It is true that this was eliminated from this opinion subsequently, not because it was not correct, but because it was unnecessary to the decision (*ib.*, 385). Now, that opinion was delivered on the 5th day of May, 1899, and on the 3d day of June of the same year the opinion was delivered in the present case; and thus stand the decisions of the supreme court upon this subject.

This paramount use had always reference to use for irrigation; and, furthermore, it extended no further than supplying the actual needs of the city at the time that it was in

a position to use it, and there never was a decision that was any authority for the proposition that, in valuing the property of the plaintiffs, the jury could take into consideration not merely the present needs of the city, nor the needs within the pueblo limits, but any necessities that might ever hereafter arise, even by the incorporation of additional territory within the limits of that city, and which, as we have said before, was further to deny any rights in the defendants at all which the jury were bound to respect. Nor were any of these decisions any authority for the proposition that this prior and paramount right of the city extended to the maintenance of lakes for the public amusement.

VI.

The criticism made upon the recitation in the patent to the city of 1866, as to the claim being founded upon a Mexican grant to the petitioners, it is respectfully submitted, is without any force.

The patent recites that the very thing which this petitioner was claiming was the confirmation of their title to a tract of land designated as the city of Los Angeles (Tr., 76).

Now, in the same sense that this was not the party to whom the grant was made, it was equally true that it was not designated as the city of Los Angeles. There was no such thing as the city of Los Angeles prior to the time the sovereignty of the United States was extended over this territory. But it is evident that these were being treated merely as different names for the same thing. It might as well be said now that the patent of the United States does not inure to the city of Los Angeles, because, forsooth, the

patent was issued to the mayor and common council, which was then its corporate name, whereas now the corporate name is the City of Los Angeles; and when it was recited in the patent that they were claiming confirmation of this tract of land, founded upon a Mexican grant to the petitioners, it was evidently treating the petitioners (namely, the mayor and common council of the city of Los Angeles) as being the corporate name of the same thing.

VII.

The claim that a governmental pueblo was entitled to have allotted to it four square leagues when the claim had been confirmed to the patentee, and the right related back to the foundation of the pueblo, is not sustained by any of the authorities cited (Brief of Defendant in Error, 49, 50). But while they do not decide what is claimed for them they do contain much that is pertinent to the present question.

In Thompson *vs.* Greeley (72 U. S., 326) it was said that the treaty of Guadalupe Hidalgo does not purport to divest the pueblo existing at the site of the city of San Francisco of any rights of property, or to alter the character of the interest it may have held in any lands under the former government; that that treaty provided for the protection of the rights of the inhabitants of the ceded country, and there was nothing in any of its clauses inducing the inference *that any distinction was to be made with reference to the property claimed by towns under the Mexican government*, nor did the subsequent legislation of Congress favor any such supposition; for it had treated the *claims of such towns* as entitled to the *same protection as the claims of individuals*, and had

authorized their presentation to the board of commissioners for confirmation (72 U. S., 334, 335).

Thus it was distinctly announced that there was not any difference between the claims of individuals and those of towns, either under the treaty or the legislation of Congress. Neither did the act of March 3, 1851, change the nature of titles to land held by individuals or towns; that the object of the act was to enable persons who claimed rights derived from Spain or Mexico to obtain a recognition of their claims, and when these were of an imperfect character to furnish a mode for perfecting them; that—

"By proceedings under that act, imperfect rights—mere equitable claims—might be converted by the decrees of the board or courts, and the patent of the Government following, into legal titles; but whether the legal title thus secured to the patentee was to be held by him charged with any trust, was not a matter upon which either board or court was called upon to pass. If the claim was held subject to any trust, before presentation to the board, the trust was not discharged by the confirmation and the subsequent patent. The confirmation only enures to the benefit of the confirmee so far as the *legal title is concerned.* It establishes *the legal title in him*, but it does not determine the *equitable relations* between him and third parties" (*ib.*, 335).

This is one of the cases in which it appeared to have been held that the pueblos were entitled, for their benefit and the benefit of their inhabitants, to use the lands constituting the site of such pueblos and towns, and of adjoining lands within certain prescribed limits, and it was said to be difficult to state with precision the exact nature of that right or title.

"It was not an indefeasible estate; ownership of the lands in the pueblos could not in strictness be affirmed" (*ib.*, 336).

But nowhere is there the slightest reference to the act of confirmation or the patent taking effect as of the date of the creation of the pueblo.

In Grisar *vs.* McDowell (73 U. S., 363) there is the same silence upon this subject. But this case does also establish certain principles material to be considered here. After speaking of the laws in relation to these Mexican or Spanish pueblos, the court said:

"These laws" (referring both to the laws of Spain and Mexico)—"these laws provided for the assignment to the pueblos, for their use and the use of their inhabitants, of land not exceeding in extent four square leagues. Such assignment was to be made by the public authorities of the Government upon the original establishment of the pueblo, or afterwards upon the petition of its officers or inhabitants; and the land was to be measured off in a square or prolonged form, according to the nature and condition of the country. * * * *Until the lands were thus definitely assigned and measured off, the right or claim of the pueblo was an imperfect one.* It was a right which the Government might refuse to recognize at all, or might recognize in a qualified form; it might be burdened with conditions, and it might be restricted to less limits than the four square leagues, which was the usual quantity assigned" (73 U. S., 373).

And it was shown in that case that there had not been any assignment made of these pueblo lands in San Francisco under the former government. Neither was there any assignment of the lands to the pueblo of Los Angeles.

It is true, as counsel has stated, that in the petition for confirmation the city of Los Angeles claimed sixteen square leagues; but the claim was confirmed only to the extent of four square leagues, and the remainder of the claim was declared to be invalid.

But can any argument more clearly show the absurdity

of the claim to this paramount right to the use of the waters than the law declared by this court in the case of Grisar *vs.* McDowell? Until the lands were definitely assigned and measured off the right or claim was imperfect, and the Government might recognize it in a qualified form or refuse to recognize it at all; it might extend to the four square leagues, or be restricted within less limits. That being true, then, pray where was this paramount and prior right previous to the assignment made by the Government of the United States to the city of Los Angeles? Was there a paramount right to the use of the waters for the needs of these sixteen square leagues, when, by this very decree, it was declared that the claim to twelve of those square leagues was invalid? And if this paramount right was to the needs of four square leagues, what particular four square leagues was it? Four square leagues could have been measured off so as to include the settlement in Los Angeles city at that time in innumerably different ways and to include different tracts of land, at least in part; and they would not have all been equal in point of necessity of water for irrigation or domestic uses, or any other. How can there be a paramount and prior right when there are no means of measuring the extent of that right nor of the lands upon which that right is to be exercised?

Palmer *vs.* Low (98 U. S., 1) simply follows the doctrines laid down in Townsend *vs.* Greeley and in Grisar *vs.* McDowell. (See 98 U. S., 16, 17.) All that is material in that decision, after reference to the cases just cited, is this:

"At the time of the conquest, the pueblo, of which the city of San Francisco became the successor, did not have an indefeasible estate in the unconveyed portion of these

lands, but only a limited right of disposition and use, subject in all particulars to the control of the government of the country. 'It was a right which the Government might refuse to recognize at all, or might recognize in a qualified form' (6 Wall., 353). Upon the conquest, the United States succeeded to the rights and authority of the Mexican government, subject only to their obligations under the treaty of Guadalupe Hidalgo. *As before that time the fee had not passed out of the government of Mexico, it was transferred to the United States by the conquest and the treaty which followed.* Before, therefore, the estate of the pueblo could become absolute and indefeasible, *some action was required on the part of the United States.* It is conceded that this action was not taken until the act of July 1, 1864. Down to that time the city held under its original imperfect Mexican title only. Afterwards it was possessed of the fee 'for the uses and purposes specified' in the Van Ness ordinance" (*ib.*, 16).

And here let us note that all of the cases cited in the brief for the defendants in error are with reference to lands within the city of San Francisco; and, as is shown in the history of that title in these very cases cited, the questions which arose in that city were largely dependent for their determination upon the municipal ordinances, the acts of the legislature of the State, and the acts of Congress confirming the title, and which various ordinances and acts have nothing to do with the title of the city of Los Angeles.

This is very clearly brought out in Trenouth *vs.* San Francisco (100 U. S., 251) and in San Francisco *vs.* Le Roy (138 U. S., 656), in which latter case the court further said:

"When the United States acquired California it was with the duty to protect all the rights and interests which were held by the pueblo of San Francisco under Mexico. The property rights of pueblos, equally with those of individuals, were entitled to protection, and provision was made by Congress in its legislation for their investigation and confirmation. * * * The confirmation of the claim of the city necessarily took effect upon its title as it existed

upon the acquisition of the country. In confirming it the United States, through its tribunals, recognized the validity of that title at the date of the treaty—at least, *recognized the validity of the claim to the title as then existing*, and in the execution of its treaty obligations no one could step in between the Government of the United States and the city seeking their enforcement" (138 U. S., 671).

But it is here distinctly declared again that there was no difference, in this or in any other respect, between pueblos and individuals. Nor is there anything in Knight *vs.* U. S. Land Association (142 U. S., 161) at all different from what was decided in the previous cases; nor did any of them in any way shake the decisions whereby it has been settled and determined that, in so far as the patent is the deed of conveyance of the United States, it operates to transfer all the right, title, and interest of the United States as of the date of the petition for the confirmation.

It is submitted that counsel are mistaken in supposing that Beard *vs.* Federy is in support of the doctrine that a patent for the confirmation of a Spanish or Mexican grant establishes the fact that the title to the land never was in the United States, but had been transferred by the former government to the patentee or his predecessor. The contrary of that proposition has been decided many times. The Government of the United States does not limit itself to the confirmation of claims where the proceedings under the former government have been such as to vest title in the Mexican grantee; but it can and in many cases has recognized mere equitable rights to have the title, recognized titles and confirmed them, which it was not bound to do under the treaty by mere legal interpretation. It has acted upon a broad spirit of equity in respect to property rights

having their origin in some sort of claims arising out of transactions with the previous government.

A confirmation is not a recognition that no title had ever passed to the United States or that it had been transferred by the previous government, but these very cases referred to—and they might be multiplied almost without limit—proceed upon a theory, and declared and established principles incompatible with the notion that merely because the Government has confirmed a claim it thereby acknowledges that it never had any right, title, or interest in the property.

VIII.

We have not contended that, merely because of the confirmation of the grants under which the plaintiffs in error claim, the patent from the United States would necessarily have vested complete title in fee-simple in the patentees as against all the world. There is in each and all of these patents—the patent to the city, as well as to those under whom the plaintiffs in error claim—this provision saving the rights of third persons, and the act of 1851 does itself save the rights of third persons. But the patent does vest the fee-simple so far as the Government is concerned, and if third persons have any rights that can be asserted against that title it must be a valid right and secured by such evidence as entitles it to recognition.

In Berthold *vs.* McDonald (22 How. or 463 U. S., 334), although the case arose under a different act, it was held that each party had a good title as against the United States; that both claims were filed in proper time; that the confir-

mations were had in due time; that the equities were equally balanced, so far as they depended on the confirmations alone, and that in this state of the case the court before whom the controversy was pending could receive evidence of facts anterior to the confirmation for the purpose of determining which had the better right.

But we claim in this case that the city never presented any such claim to the board of land commissioners as they are now asserting. Suppose the city had not presented any claim at all, even for the confirmation of its claim to the pueblo lands, we insist that the decisions are that in that case it would have had no title either to lands or water, for this court has said that no title to land in California dependent on Spanish or Mexican grant can be of any validity which has not been submitted to and confirmed by the board provided by the act of 1851 (Botiller *vs.* Domingues, 138 U. S., 338), and the act required that such claims should be presented within two years (Moore *vs.* Steinbach, 127 U. S., 70).

The cases we have been heretofore considering, concerning the pueblo lands of San Francisco, are all to the effect that these pueblo claims were not valid and perfected, under the laws of Spain or Mexico, until the lands were at least measured off to them, and that not having been done before the conquest they were not perfected until the United States Government perfected them. Hence, even if there had been any ground for the claim that where the perfect title had vested under the Mexican government, nothing further was necessary, yet still, so far as these pueblo claims were concerned, they were not of that character.

We say again that if the claim had not been presented by

the city of Los Angeles and confirmed by the board of Commissioners or the courts, the city would have had no claim either to land or water.

Now, when they did present the claim they did not present any claim for anything in the lands contained within San Rafael, Providencia, or Cahuenga, and that as to everything for which they did present a claim, except the four square leagues (which do not come within seven miles of these lands), the claim was rejected.

We say that the rights which they are claiming against the plaintiffs in error are not mere equities, nor are they appurtenant to the pueblo lands, but the very thing claimed here is a substantive part and parcel of the things which were granted by the patents of the United States to the predecessors of the plaintiffs in error, and that such a claim, in order to its being perfected, must have been presented to the board of land commissioners, and, not being presented, it is of no effect against the patent of the United States, even if it ever had any existence under Spanish or Mexican law.

In U. S. *vs.* Andreas Castilleros (2 Black (67 U. S.), 166–169), it was held that a claim to a mine, although the ownership of the mine was a title separable from the ownership of the lands for ordinary purposes, was nevertheless a claim for land within the meaning of the act of March 3, 1851. We quote this passage from page 167:

"Granting all this, still the question arises whether a mine, together with the mining rights or privilege appertaining to the same, is not land within the meaning of the act of Congress under which the commissioners were appointed. Persons claiming lands in California by virtue of any right or title derived from the Spanish or Mexican governments are required to present the same to the com-

missioners for adjudication, and of course the commissioners have jurisdiction to decide upon the validity of all such claims."

After considering the nature of this property right, the court came to the conclusion that it was land within the meaning of that act, and properly presented to the board of land commissioners.

Everything is true of the water rights claimed here that was true of the mines there. They had been held by the courts of California and every other court, so far as we are advised, to be a thing severable from the land. We speak now of the running waters, and they may be conveyed independently of the lands. The supreme court of California holds that the act of Congress of 1866 was a grant of the waters flowing upon the public lands, separate and apart from the lands and all whose claims came within the description of the thing granted.

Indeed, the very acts of the State of California upon which the city relies, except when disclaiming, to avoid the jurisdiction of the Federal courts, purport to grant these waters, surface and subterraneous, with the exclusive right to develop the same, in the lands of others and anywhere from their source to the south boundary of the city, and they were admitted in evidence solely as a transfer of the pueblo property to the American city, and the property thus attempted to be transferred was not held by a perfect title and could not be perfected in any other way than that provided by Congress.

We do not deem it at all necessary to follow the argument of counsel contained in their brief as to the character of

these waters; nor do we think that there is any occasion for any extended examination of the evidence in this case to enable this court to determine it. As we have taken occasion to say before, it has never been our idea that this court would sit to rejudge the judgment of the State court upon any matter of fact, but that the court can read in the very opinion of the State supreme court and in the instructions to the jury most favorable to the defendant in error, supplemented only by a very few additional or rather explanatory facts not controverted by anybody, all that is necessary to be known for the decision of the case.

Add to any of these statements of the case simply the facts as to the dimensions given; as, for instance, where the court in its instructions speaks of the "stream flowing upon the surface," add of an average width of about forty-five feet, and to the subterranean waters flowing through a much larger space, add, to wit, a space of two and a half to three miles; to the "much less velocity," add as two and a half to three feet per second is to fourteen to seventeen miles per annum, and the case made is complete; and, as we said before, there is no controversy between us about it, except over trivial matters of more or less, but not affecting the legal question at all.

To this we shall only add that it is of no avail to say that somebody estimated quantities to be very much less than we claim, for what we contend is that the evidence upon which the jury might have found that there was very much more was there; and when the court instructed the jury that it did not make any difference whether it was there or not, because it did not belong to the plaintiffs in error, that

was to take the property of the plaintiffs (if it belonged to them) and to remove it altogether from the consideration of the jury. It is useless to say what this or that witness said about the quantity, for the jury were not left at liberty to decide which of these witnesses spoke the truth or arrived at an opinion with the better judgment.

We respectfully submit the cause to the court.

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